



Federal Communications Commission
Washington, D.C. 20554

July 1, 2010

DA 10-1240

In Reply Refer to:

1800B3-MM

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In Re: Harvest Time Apostolic Ministries
New NCE (FM), Barstow, CA
Facility ID No. 174237
File No. BNPED-20071022AIJ

Petition for Reconsideration

Dear Mr. Alpert:

We have before us a Petition for Reconsideration ("Petition") filed on December 11, 2009, by Harvest Time Apostolic Ministries ("Harvest Time"), seeking reconsideration of the staff's dismissal of its application for a new noncommercial educational ("NCE") FM facility in Barstow, California ("Application").¹ For the reasons set forth below, we deny the Petition.

Background. Harvest Time was among 26 mutually exclusive applicants for an NCE FM station construction permit.² These applications, which propose to serve 12 different communities in California and Nevada, were designated NCE MX Group 507. Pursuant to established procedures,³ on October 6, 2009, the Media Bureau ("Bureau") determined that the Hilltop Church ("Hilltop") application⁴ for a new NCE FM station in Pahrump, Nevada, was entitled to a decisive preference under Section 307(b) of the

¹ See *Broadcast Actions*, Public Notice Report No. 47112, p.30 (Nov. 16, 2009).

² See *Threshold Fair Distribution Analysis of 28 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 24 FCC Rcd 12390, 12399-12400 (MB 2009) ("2009 Fair Distribution MO&O").

³ See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("NCE Comparative Order"); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) ("NCE Comparative MO&O"), reversed in part on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

⁴ File No. BNPED-20071018ARH.

Communications Act of 1934, as amended (“Act”),⁵ and identified Hilltop as the tentative selectee in NCE MX Group 507.⁶

On November 10, 2009, the Bureau dismissed the Application. The *Public Notice* announcing this action was released on November 16, 2009.⁷ In response to that *Public Notice*, Harvest Time filed a timely petition for reconsideration of the Application’s dismissal.

Discussion. In its Petition, Harvest Time does not challenge the Bureau’s tentative selection of Hilltop’s application. Rather, Harvest Time seeks reconsideration of its Application’s dismissal, and reinstatement of the Application *nunc pro tunc* pursuant to Section 73.3522(b)(3) of the Commission’s Rules.⁸ Harvest Time asserts that it has submitted with its Petition an “amendment resolving all mutual exclusivities” and maintains that the Application is now grantable as a “singleton” application.⁹

We have reviewed Harvest Time’s Petition and amendment. The application, as amended, remained in conflict with six Group 507 applications. Accordingly, we reject Harvest Time’s assertion.¹⁰ The conflicts to these six competing proposals were “resolved” not by any action taken by Harvest Time but by the staff’s dismissal of these applications in conjunction with the tentative selection of the Hilltop application in NCE MX Group 507. It is well-established that the Commission will not grant a competing application simply because it is not mutually exclusive with the tentative selectee’s proposal. In the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group as part of the NCE comparative licensing process.¹¹ The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.¹² Instead, the Commission determined that

⁵ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

⁶ See *2009 Fair Distribution MO&O*, 24 FCC Rcd at 12399-12400. The staff subsequently granted Hilltop’s unopposed application on December 17, 2009. See *Broadcast Actions*, Public Notice, Report No. 47137, p.5 (Dec. 22, 2009). That action is now final.

⁷ See *supra* note 1.

⁸ 47 C.F.R. § 73.3522(b)(3).

⁹ Petition at 1. The amended Application, which changes the proposal’s height of radiation center above average terrain from -30.7 meters (H&V) to -25.2 meters (H&V) and reduces effective radiated power from 5 kW (H&V) to 1 kW (H&V), indicates that the amended engineering parameters resolve “all mutual conflicts with other pending applications.” Amended Application, Exhibit 1 and Section VII, items 8, 9.

¹⁰ The Application, as amended, remained in technical conflict with the applications of: (1) Santa Monica Community College District (File No. BNPED-20071012APS); (2) University of Southern California (File No. BNPED-20071017ABL); (3) Gospel Spots, Inc. (File No. BNPED-20071019AOD); (4) San Bernardino Community College District (File No. BNPED-20071019AXE); (5) Misioneros Cristianos en Accion (File No. BNPED-20071022ADB); and (6) another Harvest Time Application (File No. BNPED-20071022AII), all six of which proposed Barstow, California as the community of license.

¹¹ *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

¹² *Id.* at 5105 (“... after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.”) (emphasis in original).

the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually exclusive with the primary selectee of the group.¹³ Additional grants are permissible from a single NCE MX group only if an applicant, solely by technical amendment(s) and/or the voluntary dismissal of competing application(s), eliminates *all* conflicts to *all* other applications in the group.¹⁴ Thus, Harvest Time's reliance on the dismissal of conflicting applications pursuant to the *2009 Fair Distribution MO&O* is fatal to its request for reconsideration.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on December 11, 2009, by Harvest Time Apostolic Ministries IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Harvest Time Apostolic Ministries
John Neely, Esq. (counsel to Hilltop Church)

¹³ *Id.* The Commission recently reiterated that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed. See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681, 1716 (2010) (“Finally, we note that we previously concluded that only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window. Accordingly we direct the staff to deny petitions for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application.” (internal citations omitted)).

¹⁴ See 47 C.F.R. § 73.7003(d).